

### **Remarks**

In the Office Action mailed January 25, 2005, the drawings of the application were objected to for failing to show every feature of the invention claimed. It was contended that the tubular body having a first wall thickness at the first end that is larger than the second wall thickness at the second end, as recited in claim 13, was not shown in the drawing figures.

It is respectfully submitted that the subject matter of claim 13 is shown in the drawing figures. As set forth in the specification at page 6, lines 2-6, the rim 38 projects outwardly from the tubular wall exterior surface 24 and gives the tubular wall 22 an increased thickness at the first end edge 28 than at the second end edge 34 of the body. The rim 38 is clearly shown in Figures 1 and 2. Therefore, the subject matter of claim 13 is shown in the drawing figures, and it is requested that the objection to the drawings be withdrawn.

Claims 1-5, 7-9, 11-14, 16-18, and 20 were rejected under 35 U.S.C. §102(b) as being anticipated by the disclosure of the U.S. Patent of Peeples, et al. No. 5,964,365. Of the rejected claims, claims 1 and 14 are independent claims. Claim 1 has been amended herein. It is respectfully submitted that the Peeples reference fails to identically show the subject matter of the invention recited in claims 1 and 14, and therefore fails to anticipate the subject matter of the rejected claims. The rejection of the claims should therefore be withdrawn and the claims allowed.

Amended claim 1 recites a food packaging closure apparatus. The common understanding and dictionary definition of the word "packaging" is the material used for

making packages such as a wrapped or boxed object. Food packaging is commonly understood to be the material used to wrap or box food.

Amended claim 1 requires that the apparatus be a food packaging closure apparatus. Although this language appears in the preamble of the claim, the counts of the claim also refer to the second end of the tubular body having means for attaching the body second end to packaging of a food product. This feature of the invention is not disclosed or suggested by the Peebles reference.

The Peebles reference discloses a lid and collar system that is specifically designed for use with a pan or a dish, and not with a packaged food product as required by claim 1.

For a prior-art reference to anticipate, every element of the claimed invention must be identically shown in a single reference. In re Bond, 910 F.2d. 831, 15 U.S.P.Q. 2d. 1566 (Fed. Cir. 1990).

To determine whether a claim limitation is meant literally where expressed as a means for performing a stated function, a court must compare the accused structure with the disclosed structure and must find equivalent structure as well as identity of claimed function for that structure.

Pennwalt Corp. v. Durand-Wayland, Inc., 833 F.2d. 931, 4 U.S.P.Q. 2d. 1737 (Fed. Cir. 1987).

The Peeples reference contains no suggestion of a food packaging closure apparatus having identity of the claimed function as required by the above-cited case law. The reference contains no suggestion of a second end that attaches to packaging of a food product, and clearly does not identically disclose the claimed function of attaching the body second end to packaging of a food product as required by claim 1. Under the above-cited case law, the Peeples reference fails to anticipate the subject matter of claim 1, and claim 1 and its dependent claims 2-13 are all allowable over the Peeples reference.

Independent claim 14 is a method claim that describes a method of preserving a food product in food packaging that has a food packaging opening. The Peeples reference clearly fails to identically disclose the subject matter. The Peeples reference is not remotely related to food packaging, but describes a lid and collar system used with a pan or dish. For this reason alone, the Peeples reference fails to disclose every element of the claimed invention as required by the case law, and fails to anticipate the subject matter of claim 14.

Furthermore, claim 14 recites positioning the second end of the tubular body on the food product so that the tubular body extends around the food packaging. As explained above, the Peeples reference has no relation to food packaging. The Peeples reference describes a lid and collar system that is used with a pan or dish. There is no suggestion of using a lid and collar system with food packaging. For this additional reason, the Peeples reference fails to identically disclose the subject matter of the invention under the case law cited above. Claim 14 and its dependent claims 15-20 are therefore all allowable over the Peeples reference.

Claims 6, 11, 15 and 19 were rejected as being obvious under 35 U.S.C. §103(a) in view of the Peebles reference. As explained below, this rejection is based on a hindsight interpretation of the Peebles reference disclosing a resilient second opening. For this reason, the rejection of these claims is made in error, and the claims are allowable over the Peebles reference.

Claim 6 has been amended into independent form herein. Claim 6 includes the subject matter of claim 1 and provides the additional structural limitation of the tubular body second end being resilient and engagable around the food product.

Contrary to the arguments made in the rejection of claim 6, the Peebles reference contains no disclosure of the collar 20 being resilient. The rejection of claim 6 interprets Figures 5A and 5B of the Peebles reference as disclosing a closure that must be molded of plastic. The plastic being a resilient and stretchable material. However, this argument is based entirely on hindsight of the present invention. There is no support for this interpretation of Figures 5A and 5B in the Peebles reference. The only support can be found in the Applicant's specification. Because the rejection of claim 6 is based on hindsight, the rejection is made in error. For this additional reason, claim 6 is allowable over the prior art of record.

The rejection of claims 11 and 19 contends that it would be obvious to give the Peebles lid and collar system a rectangular configuration. However, the system is specifically designed for use with dishes and pans, which are typically round. Again, the only support for a rectangular food packaging closure apparatus can be found in the Applicant's specification. Thus, the rejection of claims 11 and 19 is based on hindsight

of the present application. For this additional reason, the rejections of the claims are made in error, and the claims are allowable over the prior art.

It is respectfully submitted that in view of the amendments and remarks presented herein, the application is in condition for allowance and a favorable action is requested.

Respectfully submitted,

**Thompson Coburn LLP**

By: Joseph M. Rolnicki  
Joseph M. Rolnicki  
Reg. No. 32,653  
One US Bank Plaza  
St. Louis, MO 63101-1693  
(314) 552-6286